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of the business, the convenience or inconvenience to the public caused by granting the privilege, and the cost of issuing the license, together with any cost for the inspection of the business afterwards, are all matters to be considered; but they should rather be regarded merely as evidence to show what the real purpose and intent back of the assessment are. The fundamental consideration in each case must be to determine whether the main object of the levy is regulation or revenue. If it is for the first purpose, it should be regarded as a license, even though a considerable return is netted to the state; and if it is for the second, it should be considered as a tax, even though there may incidentally be some regulation. Examples of the assessment for regulation are the liquor license,⁶ and the theatre license.⁷ An illustration of the second class is a franchise tax upon an ordinary manufacturing corporation, which has recently been held by the United States Supreme Court to be a tax within the section of the Bankruptcy Act giving a preference to a state in the collection of taxes.⁸ *State of New Jersey v. Anderson*, Dec. 10, 1906. In proportion as the need of regulation and the inconvenience to the public caused by carrying on the business may be large, so may the return to the state in the shape of revenue be considerable without the assessment being regarded as an exercise of the taxing power. What might, therefore, be a license under one state of facts, might amount to a tax under another. The hopeless conflict in the cases on this point is seeming rather than real, for the question, as largely one of fact, may be legitimately construed in different ways.

RECENT CASES.

BAILMENTS — BAILOR AND BAILEE — LIABILITY OF SHOPKEEPER FOR PROPERTY OF CUSTOMERS. — The plaintiff called at the defendants' store to purchase a vest. The clerk, being busy, told the plaintiff where the vests were piled, and suggested that he select one and try it on. After the plaintiff had done so he discovered that his own vest was gone. *Held*, that the judgment of the lower court giving the plaintiff the value of the vest and its contents cannot be sustained, since it appears the loss occurred through the negligence of the plaintiff. *Wamser v. Browning, King & Co.*, 36 N. Y. L. J. 1283 (Ct. App., Jan. 8, 1907).

When it is a necessary incident to the business that the customer temporarily lay aside certain property, the shopkeeper impliedly assumes the custody of the goods as a bailee, owing a duty of reasonable care. Thus a customer has recovered for garments laid aside, at the request of the clerk and in his presence, in order that other garments might be tried on. *Bunnell v. Stern*, 122 N. Y. 539; *contra*, *Rea v. Simmons*, 141 Mass. 561. That the presence of the clerk or the express invitation is not always necessary to give recovery is shown by the cases where recovery has been allowed for garments left in a bath house or in a barber shop. *Bird v. Everard*, 23 N. Y. Supp. 1008; *Dilberto v. Harris*, 95 Ga. 571. Of course, if the plaintiff has been guilty of contributory negligence he cannot recover. *Troubridge v. Schriever*, 5 Daly (N. Y.) 11. In the principal case the absence of the clerk would seem to be important only as tending to show negligence on the part of the plaintiff. And it seems the question of negligence should be left to the jury, and not summarily presumed, as was apparently done here. *Cf. Hunter v. Reed*, 12 Pa. Super. Ct. 112.

⁶ *E. St. Louis v. Trustees of Schools*, 102 Ill. 489.

⁷ *Charity Hospital v. Stickney*, 2 La. Ann. 550.

⁸ § 64 a.

BANKRUPTCY — PREFERENCES — PAYMENT OF SALARY OF OFFICER BY INSOLVENT CORPORATION.—The petitioners sought to have the defendant corporation adjudged bankrupt because the corporation, while insolvent, used part of its assets to pay the salary of its president. *Held*, that the order adjudicating the corporation bankrupt be reversed. *Richmond, etc., Co. v. Allen*, 148 Fed. Rep. 657 (C. C. A., Fourth Circ.).

By the weight of authority the payment of wages to a "workman, clerk, or servant" is not a preference. *Matter of Read*, 7 Am. B. Rep. 111. But a corporation's president is not a "workman, clerk, or servant." *In re Carolina Cooperage Co.*, 96 Fed. Rep. 950. So he must be considered simply as a general creditor in deciding whether he received too large a percentage. An insolvent may transfer property in exchange for a present consideration without giving a preference under § 60 a of the Bankruptcy Act, but not in payment of a debt. *In re Wolf*, 98 Fed. Rep. 84. Strictly the payment of a salary, from its nature, can never be a present exchange; one party, generally the employee, must give credit. It may not be going too far, however, to hold that a man who is paid weekly, for example, hands over a completed week's services at the end of the week, and receives his salary in present exchange. But the payment of a prior week's salary must be considered a preference. So the petitioners, in not proving that the payment was for salary past due, did not show sufficient facts to warrant the order of adjudication.

BANKS AND BANKING — COLLECTIONS — DRAWEE'S RECOVERY AGAINST AGENT COLLECTING CHECK WITH FORGED INDORSEMENT.—The wrongful holder of a check, drawn on the plaintiff, erased the name of the payee, wrote in his own, raised the amount, and deposited the check with the defendant to collect. The defendant received payment from the plaintiff, and the depositor drew out part of the money. Both the defendant and the plaintiff were negligent in not detecting the forgery, though the defendant acted in good faith. The plaintiff sued for the whole amount paid to the defendant. *Held*, that only the amount not yet paid out by the defendant can be recovered. *Union Bank of Canada v. Dominion Bank*, 4 West. L. Rep. 407 (Manitoba, Oct. 22, 1906).

Whether a drawee can recover against the collecting agent of a holder of a raised check, or of a check under a forged indorsement, for payment made to him while acting in good faith, depends on the character of the agency. If the agency was disclosed, payment over by the agent to his principal is a defense. *Nat'l Park Bank v. Seaboard Bank*, 114 N. Y. 28; *United States v. American Exch. Nat'l Bank*, 70 Fed. Rep. 232. If it was undisclosed, payment over is no defense. *Minneapolis Nat'l Bank v. Holyoke Nat'l Bank*, 182 Mass. 130. Here, in not passing on the doubtful character of the defendant's agency, the court neglected the established test for deciding whether recovery should be for only the amount still in the defendant's possession or for the whole sum. Since the agent of an undisclosed principal is liable independently of bad faith in paying over to his principal, negligence in the drawee does not excuse the agent, if negligent also. *Merchants' Bank v. McIntyre*, 2 Sandf. (N. Y.) 431. If the agency was disclosed, such mutual negligence should not, on principle, make the agent liable. The little authority, however, is contrary. *Koontz v. Central Nat'l Bank*, 51 Mo. 275. But this errs in not seeing that, the equities being equal, the loss should lie where it falls. See *Continental Nat'l Bank v. Tradesmen's Nat'l Bank*, 55 N. Y. Supp. 545.

BILLS AND NOTES — PURCHASERS FOR VALUE WITHOUT NOTICE — GAMBLING DEBTS.—The plaintiff was an innocent purchaser for value before maturity of a negotiable promissory note given in payment of a bet. A Kentucky statute provided that wagering contracts should be void. The Negotiable Instruments Law, since adopted, provided that a holder in due course of an instrument negotiated by a person whose title was defective because of illegal consideration took free from such defect. *Held*, that the former statute is not repealed and that the note is void. *Alexander & Co. v. Hazelrigg*, 24 Bank. L. J. 39 (Ky., Ct. App., Oct. 31, 1906).

Wagering contracts, though not illegal at common law, have become so by statute almost universally. See *Drinkall v. Movius State Bank*, 11 N. D. 10. But an innocent purchaser for value of a note, unenforceable between the immediate parties because of illegality, has always been protected unless the illegality by statute made the note utterly void. See *Sondheim v. Gilbert*, 117 Ind. 71. The former Kentucky statute was construed as having that effect. The law, for commercial reasons, has always inclined toward the protection of an innocent purchaser for value of commercial paper, and it cannot be doubted that the Negotiable Instruments Law was intended to make illegality of consideration a personal and not a real defense. See *Wirt v. Stubblefield*, 17 App. D. C. 283. The Negotiable Instruments Law, then, if fairly construed would seem necessarily to have repealed by implication the prior inconsistent statute. This decision, therefore, does not seem to recognize the spirit of the law which it is interpreting, and must be regarded as a step backward in the development of the law of commercial paper. Wherever the courts have met the point before, they have decided otherwise. *Wirt v. Stubblefield, supra*; cf. *Schlesinger, Receiver v. Kelly*, 114 N. Y. App. Div. 546, 552.

BILLS OF LADING — CLAUSE QUALIFYING STATEMENT OF WEIGHT OF GOODS. — The defendant railway gave a bill of lading for fifty bales of cotton, and relying upon a former bill stated the weight to be nearly double what it was in fact. The bill contained the words "contents and condition of contents of packages unknown." The plaintiff bought the bill and upon discovering the shortage in the cotton sued the railway. *Held*, that the statement of weight is so qualified that the plaintiff cannot recover. *Alabama, etc., Ry. Co. v. Commonwealth Cotton Mfg. Co.*, 42 So. Rep. 406 (Ala.).

Generally, when the agent of a carrier gives a bill of lading for goods not received by the carrier, the agent is said to act openly beyond his authority, so that the carrier is not bound by the bill when in the hands of a *bona fide* purchaser. *Friedlander v. Texas, etc., Ry. Co.*, 130 U. S. 416; see 19 HARV. L. REV. 391. But when a shipment is actually made and only the weight of the goods is misstated, the carrier is more generally bound by the representations of his agent. *Dickerson v. Seelye*, 12 Barb. (N. Y.) 99. Furthermore, an unqualified statement of weight — a fact often ascertainable by the carrier — should import more than a mere opinion. *Relyea v. New Haven Rolling Mill Co.*, 42 Conn. 579. Hence the fact that the goods are described in the bill by bundles as well as by weight should be immaterial. But see *Shepherd v. Naylor*, 5 Gray (Mass.) 591. Of course a clause stating the weight to be unknown would render the statement of weight one of mere opinion. *Shepherd v. Naylor, supra*. But the words "contents of packages unknown" hardly refer to the total weight of a car-load shipment. An Illinois case is opposed to the present decision. *Tibbits v. R. I., etc., Ry. Co.*, 49 Ill. App. 567.

CONFLICT OF LAWS — INTESTATE SUCCESSION — ADVANCEMENTS SET OFF AGAINST ENTIRE ESTATE. — A Virginia intestate had made advances to A, one of his two heirs, for which A had agreed to relinquish his right to share in the estate. The intestate owned realty both in Tennessee, by whose law the agreement was binding, and also in Virginia, where such an agreement was invalid. In Virginia an heir who had received advancements might share in the estate upon bringing his advancements into hotchpot. *Held*, that the value of the Tennessee estate received by the other heir may be set off against and deducted from the advancements received by A, and that A need bring only the balance into hotchpot. *Mort v. Jones*, 54 S. E. Rep. 857 (Va.).

The Virginia policy of enforcing equality between heirs is here attained. But is this decision an undue trespass upon the rule that realty is governed by the law of its situs? It seems not, for the court does not attempt to interfere with the descent of the Tennessee realty. True, it may attain the same end by allowing its own realty to descend only in the manner it prescribes, but its right to prescribe such terms must be unquestioned. The only authority found is, however, a rather distant analogy. In bankruptcy a creditor cannot prove without accounting for a partial payment out of foreign personalty, though the rule is other-

wise with foreign realty. *In re Bugbee*, 9 N. B. R. 258; *Cockerell v. Dickens*, 3 Moore P. C. 98. But it does not follow that the court was without jurisdiction simply because it refused to exercise it. Moreover, there is reason for distinguishing that case from this, in that a creditor never can get more than is due him, and so no great injustice is done; while an heir who gets any more than his share is really getting more than is "due" him.

CONSTITUTIONAL LAW — CONSTRUCTION OF CONSTITUTIONS — POWER OF VICTORIA TO TAX AUSTRALIAN OFFICER. — The respondent, an officer of the Australian Commonwealth, was assessed on his official salary under the Victorian Income Tax Act. He objected that this was beyond the constitutional power of Victoria. *Held*, that the assessment was proper. *Webb v. Outtrim*, [1907] A. C. 81.

This case sets a vexed question at rest. Late Australian cases have held such a tax invalid. *D'Emden v. Pedder*, 1 Com. L. Rep. 91; *Deakin v. Webb*, 1 Com. L. Rep. 585; *contra*, *Wollaston's Case*, 28 Vict. L. Rep. 357. These decisions rested on the likeness between the American and Australian constitutions. The Australian constitution was patterned after that of the United States, and it is the rule when the statutes of one state are copied by another for the courts of the second to follow the construction already placed upon the statutes by the courts of the former. In the United States a state may not tax the salary of a federal officer, since this impedes a federal agency. *Dobbin v. Commissioners of Erie County*, 16 Pet. (U. S.) 435. This really rests on the principle that the creation of two interacting governments impliedly confers on each the power to protect its own existence, and impliedly denies to each power to destroy the other. What acts on the part of either constitute a menace or serious impediment to the other cannot be categorically defined. In the case at hand the court declined to follow the American cases on the ground that the two constitutions are not enough alike to warrant similar interpretations upon this point. Probably this simply means that it does not consider this species of tax a sufficient impediment or menace. See, further, 18 HARV. L. REV. 559.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — COMPELLING RAILROAD TO BUILD SIDE-TRACKS. — A statute required railroads, on application, to condemn a right of way and build spurs to the premises of any industrial concern not more than a half mile away. The cost was to be borne in the first instance by the industrial concern, but to be repaid by the railroad in annual instalments. The act was silent as to a right in the public to use the spur. The defendant refused to build a spur to the plaintiff's brick-yard. *Held*, that the statute is unconstitutional, because it authorizes the taking of property for a private use. *Mays v. Seaboard Air Line Ry.*, 75 S. C. 455.

The power of eminent domain can be exercised only for public purposes. While the decision of the legislature may be final as to whether there is necessity for the work, the question whether it is in its nature public or private is necessarily judicial. *Matter of Deansville Cemetery Ass'n*, 66 N. Y. 569. A few states, notably Pennsylvania, have gone far in sustaining statutes allowing the condemnation of land for private roads connecting with railways or canals. *Shoenberger v. Mulhollan*, 8 Pa. St. 134. If this extreme position is tenable, it is because the public has a genuine interest in the industry in question. In the case of coal mines and in a few other instances this may, perhaps, be granted, but a brick-yard, as here, cannot be admitted to be within this exceptional class. *C. & E. I. Ry. v. Wiltze*, 116 Ill. 449. Aside from its attempted grant of the power of eminent domain, the statute also violates both the constitution of South Carolina and the Fourteenth Amendment, because it takes the railway's property for private use in requiring it to build the spur at its own expense. *Mo. Pac. Ry. v. Nebraska*, 164 U. S. 403.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — VALIDITY OF STATUTORY REQUIREMENT FOR MAINTENANCE OF SUIT. — The charter of a municipality provided that no action should be maintained against it for personal

injury caused by snow and ice upon its streets, unless written notice of these conditions had been given before the injury. *Held*, that this provision is not in violation of the constitutional guaranty against the deprivation of life, liberty, or property, without due process of law. *MacMullen v. City of Middletown*, 79 N. E. Rep. 863 (N. Y.).

For a criticism of the decision in the lower court, here reversed, see 19 HARV. L. REV. 618.

CONSTITUTIONAL LAW — OPERATION OF CONSTITUTIONS — STATUTE UNCONSTITUTIONAL IN PART. — A statute provided that no county should tax at more than a certain per cent, but counties A and B were excepted. The state asked a writ of *mandamus* to prohibit county C from taxing in excess of this rate. *Held*, that the writ be granted, for though the exception of counties A and B is unconstitutional, yet the rest of the statute is not therefore invalid, since the exception can be struck out. *State ex rel. Dillon v. Braxton County Court*, 55 S. E. Rep. 382 (W. Va., Ct. App.).

That part of a statute may be valid and part invalid is well settled. But the cases seem to offer two somewhat contrary tests to determine when the part not struck out should stand alone. One is that it must conform to what was the legislature's intent in passing it. The other is that, though by itself it does not so conform, it is nevertheless valid if the court thinks that the legislature would have passed it alone rather than not have had it at all. The former test is supported by most authority on actual decisions, though the language commonly used confuses the two. *Sprague v. Thompson*, 118 U. S. 90; *Burkholtz v. State*, 16 Lea (Tenn.) 71. The latter, illustrated by the principal case, has some precedents, which do not seem to consider the grave danger of judicial legislation in a court undertaking to say what a legislature would have done. *People v. Knopf*, 183 Ill. 410, 422; *State v. Baker*, 55 Oh. St. 1. The present decision extends the legislature's intent beyond the limit it expressly set. That a contrary decision would invalidate a whole system of taxation would be unfortunate, but not a justification for this result. *State v. Supervisors*, 62 Wis. 376.

CONSTITUTIONAL LAW — TRIAL BY JURY — RIGHT TO PUBLIC TRIAL. — During the recital of immoral and obscene testimony the trial judge excluded from the court-room all persons except the defendant and one of his witnesses, the jury, officers of the court, members of the bar, and newspaper men. *Held*, that the defendant's constitutional right to a public trial has been violated. *State v. Hensley*, 79 N. E. Rep. 462 (Oh.). See NOTES, p. 489.

CORPORATIONS — CORPORATE POWERS AND THEIR EXERCISE — INJUNCTION BY MINORITY STOCKHOLDER AGAINST SALE OF STOCK TO ANOTHER CORPORATION. — A telephone company, in pursuance of an unlawful plan to create a monopoly, bought up a majority of the shares of a competing corporation. A stockholder in the second corporation filed a bill against both corporations, seeking to restrain the transfer of the stock on the books of his own corporation, and also the voting on such stock by the purchaser. *Held*, that the prayer of the bill be granted. *Dunbar v. American Tel. and Tel. Co.*, 79 N. E. Rep. 423 (Ill.).

Any purchase by one corporation of stock in another to restrain trade is universally held *ultra vires* of the buyer. Thus in the present case a stockholder of the buying corporation would have been granted equitable relief. *Farmers' Loan and Trust Co. v. N. Y., etc., R. R.*, 150 N. Y. 410. And where, as here, the purchase achieves an illegal result, the corporation whose stock is held, equally with the corporation holding, may be dissolved by the state. *People v. North River, etc., Co.*, 121 N. Y. 582. Thus the stockholder of the selling corporation has a lively interest, which equity here recognizes, in preventing such a possibility. *Harding v. American Glucose Co.*, 182 Ill. 551. If, however, the holding, though *ultra vires*, is not illegal, the state will not dissolve the corporation whose stock is held, and so the mere purchase should not be ground for equitable relief. *Milbank v. N. Y., etc., R. R. Co.*, 64 How.

Prac. (N. Y.) 20. But if the buying corporation attempts to vote on the stock, the tendency of its vote is manifestly to favor its own plans even at the expense of the other, and a stockholder of the latter should be allowed to enjoin the voting. *Milbank v. N. Y., etc., R. R. Co., supra*; but see *Oelbermann v. N. Y., etc., R. R.*, 27 N. Y. Supp. 945; aff. 29 N. Y. Supp. 545.

COURTS — PLEA THAT COURT NOT LEGALLY ORGANIZED. — In the court below the defendant filed "a plea to the jurisdiction of the court," alleging that "this court is without lawful constitution" since the commission to the judge was invalidly issued. *Held*, that the lower court was correct in overruling the plea. *State v. Hall*, 55 S. E. Rep. 806 (N. C.).

This decision is put upon the ground that "no court can pass upon the validity of its own constitution and organization." It is reasoned that the defendant has called upon the lower court to exercise a judicial function in denying its own existence, whereas by the nature of his plea he avers that, having no existence in law, it has no such function. See *Beard v. Cameron*, 3 Murph. (N. C.) 181; *cf. Koehler and Lange v. Hill*, 60 Ia. 543, 603. This philosophy seems rather extraordinary. Logically applied it produces the result that the invalidity of the highest court in any jurisdiction, be it never so unquestionable, can in no way be judicially adjudged. The fallacy in the reasoning is, of course, apparent: while the invalidity of the judge's commission may prevent his constituting a *de jure* court, he forms, at least, a *de facto* court. See *State v. Lewis*, 107 N. C. 967. Obviously nothing *in rerum natura* prevents such a court's passing on its own validity as on other questions. The result of the present decision, however, seems quite correct; for the law is apparently settled that the authority of a *de facto* judge cannot be attacked collaterally. *Clark v. Commonwealth*, 29 Pa. St. 129; *In re Manning*, 139 U. S. 504.

CRIMINAL LAW — FORMER JEOPARDY — IMMATERIAL VARIANCE. — In a former trial the defendant asked for a direction for acquittal on the ground of a variance. The judge, erroneously believing the variance material, directed the acquittal. *Held*, that the defendant was once in jeopardy and cannot be tried again for the same offense. *Drake v. Commonwealth*, 96 S. W. Rep. 580 (Ky.).

As the proof offered to support the second indictment would have supported a conviction under the first, the defendant was technically in double jeopardy. See 1 BISHOP, CRIM. LAW, § 1052. But a defendant by his acts may put himself in such a position that he will not be allowed to set up his former jeopardy. Thus, although a defendant has been tried under a valid indictment, if by his motion the indictment is quashed or an acquittal directed because of a supposed defect in the indictment, he is not allowed to plead that jeopardy as a bar to another trial for the same offense. *United States v. Jones*, 31 Fed. Rep. 725; *cf. People v. Casborus*, 13 Johns. (N. Y.) 351. It seems that the same result should follow when at the defendant's request the judge directs an acquittal because of an alleged but non-existent material variance. *People v. Meakim*, 61 Hun (N. Y.) 327; *Carroll v. State*, 98 S. W. Rep. 859 (Tex.); *contra, People v. Terrill*, 132 Cal. 497. In both situations the actual jeopardy was ended by a ruling made at the defendant's request for causes which if true would have rendered the first trial no bar to another trial on a correct indictment. The refusal to allow this former jeopardy to be pleaded is based on estoppel or, more properly, waiver.

EASEMENTS — SEVERANCE AND TRANSFER OF RIGHT — RESERVATION BY GRANTOR OF DOMINANT TENEMENT OF RIGHT OF ACTION FOR INFRINGEMENTS. — The owner of the fee, after instituting an action against the defendant for the infringement of easements appurtenant by permanent structures, sold the fee, reserving this right of action. Therein she subsequently recovered fee damages. After several mesne conveyances with similar reservations, the plaintiff, knowing all the facts, purchased the fee; but whether before or after the defendant's payment of fee damages did not appear. *Held*, that the plaintiff cannot maintain action against the defendant for the infringement of the easements. *Friedman v. New York, etc., R. R. Co.*, 52 N. Y. Misc. 20.

Logically following the New York doctrine in this sort of easement case, the court denied the plaintiff a right of action because he would be obliged to hold any sums which he might be allowed to recover, as trustee for the original grantor, and in this case that *cestui* had already received all to which he was entitled. See 20 HARV. L. REV. 136. If the comments on this doctrine, made in the note just cited, be sound, a more natural solution of the problem in cases where, as here, the parties do not attempt to reserve to the grantor the easement itself, but merely intend that he shall have the privilege of suing for infringements thereof, seems found in construing the words of reservation, whenever possible, as an agreement by the grantee as owner of the dominant tenement to give the grantor a power of attorney to sue for the infringements for his own benefit. Subsequent purchasers of the land with notice of the agreement would then be held bound in equity to give a similar power of attorney; and the payment of permanent fee damages to the original grantor would extinguish the easement.

ELECTIONS — QUALIFICATION OF VOTERS — INMATES OF NATIONAL SOLDIERS' HOMES. — Congress created a corporation the object of which was to erect and maintain national soldiers' homes. The board of managers were to be government officers and appointees, and the necessary funds were to be supplied from the United States Treasury. The corporation purchased land and the state legislature ceded jurisdiction over the land to the United States, with a proviso that the inmates of the home should not be denied the right to vote. *Held*, that the inmates are not residents of the state, and therefore under the state constitution are not entitled to vote. *State v. Willet*, 97 S. W. Rep. 299 (Tenn.).

Land purchased by the United States with the consent of the state for the erection of forts, dockyards, and other needful buildings, as provided by the Constitution, is under the exclusive jurisdiction of the federal government, and persons residing on it do not acquire a local residence. See *Ft. Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525. Cases like the present have, however, been distinguished because soldiers' homes are not "needful buildings" and because the land is held in the name of the corporation. For these reasons a statute ceding jurisdiction has been construed as giving merely concurrent jurisdiction. *In re Kelly*, 71 Fed. Rep. 545. Under this construction an inmate of a soldiers' home might properly acquire local citizenship. But as soldiers' homes are incidental to the war power, and as the difference in title does not affect the use to which the land is to be put, that construction seems unsound. *Sinks v. Reese*, 19 Oh. St. 306; *Foley v. Schriver*, 81 Va. 568. But even granting that the land be within state jurisdiction, it is very seldom that persons living at a charitable home have the requisite intent to acquire residence where such institution is located. *Silvey v. Lindsay*, 107 N. Y. 55.

EMINENT DOMAIN — WHEN PROPERTY TAKEN — POLLUTION OF NAVIGABLE STREAM. — A canal company, operating under the right of eminent domain, constructed a canal for navigation purposes from the sea to a fresh water navigable stream which the plaintiff, an upper riparian proprietor, used for irrigation. The canal caused the salt water to flow in with the tide, and as a result of the use of this water the plaintiff's crops were destroyed. *Held*, that the sovereign rights of the state are no bar to the plaintiff's recovery. *Bigham Bros. v. Port Arthur Canal & Dock Co.*, 97 S. W. Rep. 686 (Tex., Sup. Ct.).

The common law rule that the sovereign owns the soil of navigable waters has long been recognized. Riparian rights on navigable streams are, however, so variant in different localities, that they are said to be governed by local law. See *Shively v. Bowlby*, 152 U. S. 1; 18 HARV. L. REV. 341. Consequently authorities conflict as to whether damages are recoverable for injurious affections of tide waters caused by those acting under the right of eminent domain. See 14 HARV. L. REV. 158. Some courts, denying recovery in such cases, allow it to owners above the point of navigability. *Simmons v. Mayor of Paterson*, 60 N. J. Eq. 385. This is illogical and theoretically wrong. The real reason for riparian rights is the contiguity of land and stream, not unity of ownership.

See *Lyon v. Fishmonger's Company*, L. R. 1 App. Cas. 662. By the better authority the riparian owner has a right to use waters of navigable and non-navigable streams alike, so far as is consistent with the sovereign ownership of soil beneath the navigable water. He has a property right to have the waters flow as usual, unpolluted by back-water or tide, and may recover for a violation of this right. *Morrill v. St. Anthony Falls Water Power Co.*, 26 Minn. 222; see *Barret v. Metcalf*, 12 Tex. Civ. App. 247.

EQUITABLE ELECTION—GIFT BY DEVISEE TO HEIR.—A testatrix, who held a half interest with her husband, devised her interest to him. He conveyed parcels of the estate to the children and heirs of the testatrix. After his death they petitioned to have the will of their mother set aside. The defendants contended that the children, having accepted these gifts, were estopped from maintaining the invalidity of the will. *Held*, that the doctrine of equitable election is not applicable. *Holland v. Coutts*, 98 S. W. Rep. 236 (Tex., Sup. Ct.).

When a testator leaves property to A and at the same time leaves some of A's property to B, then A, if with knowledge of the devise to B he accepts the benefits under the will, is by the doctrine of equitable election precluded from defeating the will by claiming his property which was left to B. *Streatfield v. Streatfield*, Cas. t. Talb. 176. The doctrine is put on the ground of an implied condition to this effect. *Noys v. Mordaunt*, 2 Vern. 581. This rule has also been applied to deeds. *Bigland v. Huddleston*, 3 Bro. Ch. *285 n. But in the present case there was no such election under the will, for by that instrument the petitioners took nothing. That they are estopped, by their acceptance of the conveyance to them by their father of land that he received under the will, seems to be impossible in view of the fact that they now make no claim under that conveyance. Under the deed the doctrine of election is inapplicable, for that instrument presented no alternative rights, and so no opportunity for election. *Fifield v. Van Wyck*, 94 Va. 557.

EVIDENCE—RES GESTÆ—PROXIMITY OF TIME.—The plaintiff's intestate, having been injured and rendered unconscious through the alleged negligence of the defendant, made certain statements as to how the accident happened immediately after regaining consciousness. *Held*, that such statements are admissible as part of the *res gestæ*. *Christopherson v. C., M. & St. P. Ry. Co.*, 109 N. W. Rep. 1077 (Ia.).

The reason for the rule admitting the contemporaneous statements of the injured party or an eye-witness lies, it is believed, in the great probability of their being true. *State v. Wagner*, 61 Me. 178. This probability arises from the mental or bodily disturbance caused by the accident, which is supposed to deprive the person of his power of fabrication. See *Mitchum v. State*, 11 Ga. 615. The necessity of absolute contemporaneousness is in dispute. The line of authority demanding it proceeds on the reason that statements not absolutely contemporaneous are not part of the *res gestæ*, but are purely narrative. *Reg. v. Bedingfield*, 14 Cox C. C. 341; *Waldele v. N. Y., etc., Co.*, 95 N. Y. 274. Another line of authority admits statements made shortly after an accident, although clearly narrative, if the test of probability of truth is satisfied. *Insurance Co. v. Mosley*, 8 Wall. (U. S.) 397. The latter view, though less convenient to apply than the stricter doctrine, seems preferable. The statements may be equally true whether made at the time of the accident, or, as the present case well shows, made some time after but before the presumption of possible fabrication arises. *Hill v. Commonwealth*, 2 Grat. (Va.) 594; but see 14 HARV. L. REV. 230.

INSURANCE—MUTUAL BENEFIT INSURANCE—DIVORCE OF BENEFICIARY.—A statute governing fraternal beneficiary associations confined payments of death benefits to the family, heirs, etc., of the members. The constitution of one of these associations limited payments in the same way. A member named his wife as beneficiary, and if she should die his representatives were to take in trust for his heirs. The wife became divorced. *Held*,

that the representatives take in trust for the heirs. *Brotherhood of Railroad Trainmen v. Taylor*, 9 Oh. Circ. Ct. Rep. (N. S.) 17.

In ordinary life insurance the contract is embodied in the policy, and, the beneficiary's rights being vested, a divorce does not affect them. *Overhiser v. Overhiser*, 63 Oh. St. 77. In mutual benefit society insurance the laws of the society are part of the contract, and, these laws being subject to change, the beneficiary's rights vest only on the death of the insured. See *Holland v. Taylor*, 111 Ind. 121. Till then they are a mere expectancy, divested at his will. *Masonic, etc., Ass'n v. Bunch*, 109 Mo. 560. So even where a member dies without having revoked a provision in favor of a wife since divorced, the latter should receive no benefit, for at the time the right would vest she is no longer within the favored class of relatives. *Order of Railway Conductors v. Koster*, 55 Mo. App. 186. Apparently conflicting decisions on this point are generally accounted for by variations in the constitutions and by-laws of the different societies. For example, some courts reach a result opposite to that of the principal case because of the absence of an express limitation on payment, the wife being a proper beneficiary when appointed. *Courtois v. Grand Lodge*, 135 Cal. 552. The case under discussion is clearly correct, even without the aid of the statute.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — FEDERAL EMPLOYERS' LIABILITY ACT. — The Act of Congress of June 11, 1906, c. 3073, 34 Stat. at L. 232, 233, provided that "every common carrier engaged in trade or commerce . . . between the several states . . . shall be liable to any of its employees or in case of his death to his personal representative . . . for all damages which may result from the negligence of any of its officers, agents, or employees . . ." *Held*, that the statute is unconstitutional. *Brooks v. Southern Pac. Co.*, 148 Fed. Rep. 986 (Circ. Ct., W. D. Ky.); *Howard v. Illinois Cent. R. R. Co.*, 148 Fed. Rep. 997 (Circ. Ct., W. D. Tenn., W. D.). See NOTES, p. 481.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — NATIONAL ARBITRATION ACT. — The Act of Congress of June 1, 1898, c. 370, § 10, provided that any common carrier engaged in interstate commerce, or any agent thereof, who "shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership" in a labor organization "is hereby declared to be guilty of a misdemeanor." *Held*, that the statute is unconstitutional. *United States v. Scott*, 148 Fed. Rep. 431 (Dist. Ct., W. D. Ky.).

The decision is expressly rested on two grounds: first, that the Act is not a regulation of "commerce among the several states" within the meaning of the Constitution; secondly, that at all events the Act by its terms also applies indiscriminately and inseparably to purely intrastate commerce. The very same considerations that determine the validity of the Federal Employers' Liability Act must furnish the criteria by which to judge the constitutionality of the act now in question. See NOTES, p. 481. These criteria seem to show the latter as well as the former act to be unsanctioned by the interstate commerce powers of Congress. While regulating the relations between employers and employees engaged in interstate commerce, § 10 of the National Arbitration Act seems to react in no appreciable manner as a regulation of interstate traffic or intercourse. The object of this section, as well as its result, appears to be the promotion of the welfare, not of interstate transportation or transit or traffic, but of union labor.

LEGACIES AND DEVISES — VOID OR VOIDABLE BEQUESTS AND DEVISES — EFFECT OF LAPSE ON EXECUTORY GIFTS OTHERWISE ILLEGAL. — A testator bequeathed \$1500 on a dry trust for his brother, and directed that any of it remaining at his brother's death be divided between two nieces. There was a residuary clause, immediately followed by another which directed that, if any one entitled to a share in the estate should die before being paid, his share should go into the residue. The brother predeceased the testator. *Held*, that

the \$1500 goes to the residuary legatees. *Young v. Robinson*, 99 S. W. Rep. 20 (Mo., K. C. Ct. App.). See NOTES, p. 483.

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — DICTATION TO STENOGRAPHER AND TRANSMISSION BY CABLE. — To transmit privileged defamatory information concerning the plaintiff to an interested party in a foreign country, the defendant dictated a letter to a stenographer, who typewrote and copied it. The defendant also sent a defamatory cablegram in a code which could readily be interpreted. *Held*, that, the communication being privileged, such publications are not actionable. *Edmondson v. Birch & Co. & Horner*, 23 T. L. R. 234 (Eng., Ct. App., Jan. 14, 1907).

Whether considered as libel or slander, the dictation of unprivileged defamatory matter to a stenographer, being a communication to a third person, is a publication, and actionable. *Gambrill v. Schooley*, 93 Md. 48. So is a defamatory message written and delivered to a telegraph company for transmission. *Monson v. Lathrop*, 96 Wis. 386. Nor should business demands justify a different result. See *Pullman v. Hill & Co.*, [1891] 1 Q. B. 524. When, however, the publication to third persons is subsidiary to the communication of privileged information, the mere fact of publication should not, in the absence of bad motive, beget an action. For when the writing and the transmission of the privileged defamatory words are reasonably necessary means of making the communication, the privilege should be extended. Under these circumstances, accordingly, it has been held that publication to a copyist is privileged. *Harper v. Hamilton, etc., Ass'n*, 32 Ont. 295. Similarly, transmission by telegraph or cable should be privileged. See *Robinson v. Jones*, 4 L. R. Ir. 391, 396; *cf. Williamson v. Freer*, L. R. 9 C. P. 393. And, in cases where the privileged matter is to be communicated to numerous interested persons, the protection of the privilege covers even printing and circulation in pamphlet form. *Gattis v. Kilgo*, 52 S. E. Rep. 249 (N. C.).

LIS PENDENS — NATURE AND SCOPE — BASIS OF RULE. — During proceedings to foreclose a mortgage the intervening plaintiff purchased the property at an execution sale for value and without actual notice. Subsequently the mortgagor filed a cross-bill to have the mortgage cancelled, claiming a *lis pendens* from the beginning of the foreclosure proceedings. *Held*, that the *lis pendens* relative to a cross-bill seeking affirmative relief dates, as against one taking under the plaintiff, from the filing of the cross-bill. *Bridger v. Exchange Bank*, 56 S. E. Rep. 97 (Ga.). See NOTES, p. 488.

MALICIOUS PROSECUTION — PROBABLE CAUSE — CONTINUING PROSECUTION AFTER KNOWLEDGE OF INNOCENCE. — In a suit for malicious prosecution the court charged that if when the defendants instituted the prosecution they were justified in believing that the accused was guilty, but "if they continued to prosecute it after they had learned that he was not guilty of the charge, or that they had no reason to believe he was guilty of the charge, then the action was without probable cause." *Held*, that the inquiry as to probable cause relates to the time when the prosecution was commenced, and that the charge was erroneous. *Hantman v. Hedden*, 31 Pa. Super. Ct. 564.

It has been said that one should be liable who maliciously continues without probable cause a prosecution which another has begun. See *Weston v. Beeman*, 27 L. J. Exch. 57. But in the case under discussion it was the same person who continued it. The court relied upon the fact that a criminal prosecution is usually conducted by the state's attorney, and that the prosecuting witness has no control. But usually the latter exercises a very real control, and if he urges on the prosecution after ceasing to have probable cause he should be liable. *Blunk v. A. T. & S. F. Ry.*, 38 Fed. Rep. 311. Existing authority reaches a different result when he merely lets the law take its course. *Swaim v. Stafford*, 26 N. C. 392; *Scheibel v. Fairbairn*, 1 B. & P. 388. But it seems arguable that he owes a duty when he discovers his error to do what he reasonably can to stop the prosecution. *Cf. Davies v. London, etc., Ins. Co.*, 8 Ch. D. 469. In civil suits, however, the complainant has control of the prosecution,

and clearly should not continue without probable cause. But in all cases evidence that probable cause no longer existed should be strong. The evidence offered by the defendant in the first suit cannot be sufficient. *Wetmore v. Mellinger*, 14 N. W. Rep. 722 (Ia.).

PHYSICIANS AND SURGEONS — NECESSITY OF PATIENT'S CONSENT TO OPERATION. — A surgeon, by telling his patient that a very slight operation was necessary, induced her to take ether and removed her uterus. *Held*, that the patient may recover exemplary damages. *Pratt v. Davis*, 224 Ill. 300.

For a discussion of this case in a lower court, see 18 HARV. L. REV. 624.

POWERS — GENERAL POWERS — NATURE OF EXECUTOR'S TITLE WHEN APPOINTMENT BY WILL. — By the Finance Act of 1894, § 9 (1), estate duty on property which passes to the executor as such is payable out of the residue, whereas estate duty on property not passing to the executor as such is a first charge on the specific property. D, having a general power of appointment over the equitable interest in personalty, exercised it by will. *Held*, that the appointed property does not pass to the executor *qua* executor, and that the duty is payable out of the appointed property. *Re Dodson*, 51 Sol. J. 230 (Eng., Ch. D., Jan. 22, 1907).

For favorable comment upon a contrary holding on this controverted point, see 16 HARV. L. REV. 376.

RAILROADS — TITLE TO RIGHT OF WAY — USER BY TELEPHONE COMPANY AS ADDITIONAL SERVITUDE. — By condemnation proceedings a railway company acquired the right "to enter upon and occupy" the plaintiff's land for railway purposes. Later the company granted to the defendant the privilege of erecting poles and wires on its right of way for purposes not primarily concerning the railway business. *Held*, that the plaintiff may maintain trespass against the defendant telephone company. *Pittock v. Central District and Printing Telegraph Co.*, 31 Pa. Super. Ct. 589.

In construing the nature of the estate or interest condemned by railways under the various eminent domain statutes, the American courts arrive at three different results: (1) that the right acquired is an absolute fee; (2) that it is a fee conditioned on the continuance of the user, with a reversionary interest over on abandonment; and (3) that it is essentially like an easement in gross. *Prather v. W. U. Tel. Co.*, 89 Ind. 501; *Currie v. N. Y. Transit Co.*, 66 N. J. Eq. 313; *P., F. W., etc., Ry. v. Peet*, 152 Pa. St. 488. Confusion results when the second and third theories are not distinguished, and especially when the attempt is made to deduce the nature of the right *a priori*, instead of interpreting the statutes. If the language of the statute is general, as in the present case, the right condemned should be limited to the requirements of the railway. *Newton v. Perry*, 163 Mass. 319. For the exercise of the right of eminent domain is in derogation of private rights and should be strictly construed. *Lonce's Appeal*, 55 Pa. St. 16. Therefore, a right broadly analogous to an easement in gross being sufficient to permit the railway to carry on its business, the court in the case at hand properly allowed the plaintiff, as owner of the fee, to maintain trespass. *Cf. Hodges v. W. U. Tel. Co.*, 133 N. C. 225.

SET-OFF AND COUNTERCLAIM — COUNTERCLAIM AS WAIVING OBJECTION TO JURISDICTION. — A motion to quash a return of service was overruled. The defendants, after excepting, appeared as ordered and pleaded a counterclaim for damages under the contract upon which suit was brought. *Held*, that the defendants waived their right to question the jurisdiction by pleading a counterclaim. *Merchants' Heat and Light Co. v. James B. Clow and Sons*, U. S. Sup. Ct., Jan. 28, 1907.

In general, an appearance for any other purpose than to question the jurisdiction of the court gives personal jurisdiction over the defendant. *Reed v. Chilson*, 142 N. Y. 152. The better view, however, seems to admit the exception to this rule that where an objection to the jurisdiction has been erroneously overruled, it is not waived by a subsequent plea to the merits. *Southern Pacific Co. v. Denton*, 146 U. S. 202; *contra, Stevens v. Harris*, 99 Mich. 230. Other-

wise the defendant would be forced to submit to the jurisdiction or entirely to forego his right to contest the merits of the plaintiff's claim. No such severe alternative is forced upon him by refusing to extend the exception to a counterclaim pleaded after unsuccessful objection to the jurisdiction, for he is at liberty to leave the determination of the controversy involved therein to a subsequent action. *Quick v. Lemon*, 105 Ill. 578. By his counterclaim the defendant invoked the positive aid of the court in a transaction which might have been made an independent cause of action, and thereby assumed the position of a plaintiff. Such a stand seems inconsistent with the contention that the court does not have personal jurisdiction. *Farmer v. Nat'l Life Ass'n*, 138 N. Y. 265.

STATUTES — INTERPRETATION — EFFECT OF SPECIAL SAVING CLAUSE ON GENERAL SAVING STATUTE. — The defendant was indicted for paying rebates in violation of the first section of the Elkins Act, which had been superseded by the Hepburn Act. The offenses were committed prior to the enactment of the latter. An express saving clause in the Hepburn Act mentions only pending causes, but § 13 of the U. S. Revised Statutes provides that "the repeal of any statute shall not have the effect to release any penalty incurred under such statute unless the repealing act shall so expressly provide." Held, that the indictment is valid. *United States v. D. L. & W. R. R. Co.*, U. S. Circ. Ct., S. D. N. Y., Feb. 14, 1907.

It has been held that the existence of an express saving clause mentioning only pending causes of action declares by implication that no other causes based on the repealed act may be prosecuted, a general saving statute notwithstanding. *State v. Showers*, 34 Kan. 269. The reason assigned is that otherwise the special saving clause would add nothing to a general saving statute, while the law seeks to give force and effect to every word and clause in an act. See *Opinion of Justices*, 22 Pick. (Mass.) 571. But it is hard to believe that Congress intended that all unprosecuted violators of the Elkins Act should be immune from punishment. Further, the general saving statute has provided that in the absence of express contrary legislation, offenders against repealed acts might be punished. The Hepburn Act contains no express provision to the contrary; hence the general saving statute must be applied unless it is repealed by implication. But repeal by implication is looked upon with disfavor, and express legislation must control in the absence of subsequent legislation equally express. *Rosencrans v. United States*, 165 U. S. 257. This sound doctrine justifies the refusal of the court to recognize an implication opposed to the furtherance of justice, though the result be to stultify the special saving clause.

SURETYSHIP — DEFENSE OF OMISSIONS OF CREDITOR — CREDITOR'S FAILURE TO PROVE IN BANKRUPTCY. — The plaintiffs were indorsees and the defendants indorsers of a promissory note. The maker of the note became bankrupt, and the plaintiffs, having neglected to prove their claim against the estate in bankruptcy, wished to recover their whole loss from the indorsers. Held, that they can recover only the difference between the amount due on the note and the *pro rata* dividend they would have received had they proved in bankruptcy. *Second Nat'l Bank v. Prewett*, 96 S. W. Rep. 334 (Tenn.).

It is fundamental in suretyship law that a creditor, as regards the surety, owes in general no duty of affirmative action against the principal debtor. Thus, by the weight of authority, a creditor retains unimpaired his right against the surety, though his own delay has defeated his claim against the estate of a deceased principal. *Sibley v. McAllaster*, 8 N. H. 389; *contra*, *Siebert v. Quesnel*, 65 Minn. 107. So a creditor's failure to exercise his privilege of participating in insolvency proceedings will leave intact his right against the surety. *Scholt v. Youree*, 142 Ill. 233. The present decision, therefore, is against the decided weight of authority in these analogous cases, as well as in the few cases where the same situation has arisen in connection with bankruptcy proceedings. *Clopton v. Spratt*, 52 Miss. 251. The general rule first stated is not without exception, however. When the affirmative act called for is trivial, and the injury to the surety consequent upon its omission great, the creditor's failure to act

has been held to relieve the surety. *Sullivan v. State*, 59 Ark. 47. But proof in bankruptcy involves possibilities too onerous to bring it within this exception.

SURETYSHIP — DEFENSE OF OMISSIONS OF CREDITOR — NECESSITY OF NOTICE TO GUARANTOR OF ACCEPTANCE. — At the plaintiff's request the defendant wrote to him a letter guaranteeing payment for any goods A might purchase of him. Goods were then furnished to A by the plaintiff. The defendant's relations with A were such as should have kept him informed as to the transactions between A and the plaintiff. On A's failure to pay the purchase price the plaintiff sought to hold the defendant. *Held*, that lack of notice of acceptance of the defendant's guaranty is no bar to recovery. *Drucker v. Heyl-Dia*, 52 N. Y. Misc. 142. See NOTES, p. 485.

SURETYSHIP — DEFENSE OF SUSPENSION OF PRINCIPAL OBLIGATION — FRAUDULENT PREFERENCE TO CREDITOR. — The defendant, with knowledge of the insolvency of the maker of a note, accepted payment. Within four months the maker was adjudicated a bankrupt, and the plaintiff, the trustee in bankruptcy, recovered the payment. *Held*, that the defendant may recover on the note against the indorser and the sureties. *Hooker v. Blount*, 97 S. W. Rep. 1083 (Tex., Civ. App.). See NOTES, p. 484.

TAXATION — PARTICULAR FORMS OF TAXATION — TAX WITHIN MEANING OF BANKRUPTCY ACT. — A corporation went into bankruptcy owing the state for its annual license or franchise tax. *Held*, that the state is entitled to a preference over other creditors, as this is a tax within the meaning of § 64 *a* of the Bankruptcy Act. *State of New Jersey v. Anderson*, U. S. Sup. Ct., Dec. 10, 1906. See NOTES, p. 490.

TRUSTS — FOLLOWING TRUST PROPERTY — EQUITABLE LIENS ARISING FROM UNLAWFUL DEPOSIT. — A national bank unlawfully received on deposit a large sum of county taxes, mingled it with other deposits, and purchased worthless securities therewith. Into these securities could fairly be traced three-fourths of the county's deposit along with a much larger sum of the bank's own. The bank became insolvent, leaving assets insufficient to meet the county's claim. *Held*, that the county may get from the receiver the lowest amount continually on deposit during this period and also the entire proceeds of the securities. *Crawford Co. Commissioners v. Patterson*, 149 Fed. Rep. 229 (Circ. Ct., N. D. Oh., E. D.).

Though its reasoning is confused, the court's conclusion is sound. There was in fact an equitable lien on each fund. For a discussion of the true view, see 19 HARV. L. REV. 511.

WATERS AND WATERCOURSES — SUBTERRANEAN AND PERCOLATING WATERS — APPROPRIATION OF MINERALS IN SOLUTION. — The defendant, by pumping brine from his mine, abstracted salt from the plaintiff's mine. The plaintiff sought to enjoin him and to recover for the salt already withdrawn. *Held*, that the defendant has committed no actionable wrong. *The Salt Union, Ltd. v. Brunner, Mond & Co.*, [1906] 2 K. B. 822. See NOTES, p. 487.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

TAXATION OF GROSS RECEIPTS OF INTERSTATE CARRIERS. — For over fifty years the Illinois Central Railroad, an interstate carrier, has paid to the state of Illinois, in accordance with stipulations in its charter, five per cent of its gross receipts in addition to the usual property tax. A suit recently instituted by it against the state to recover back a portion of the taxes so paid has